sweeping restraints on revelation may therefore have been regarded as appropriate.

B. *18 U.S.C. § 798*

Ambiguities do not cloud the relevance of section 798 to the coverage of the Espionage Act of 1917.[370] This provision was enacted in 1950, virtually contemporaneously with 793(d) and (e), to cover cryptographic information, material surely at the heart of the "related to the national defense" conception.[371] Explicit assumptions were made as to the coverage of 793 and 794.

Section 798 makes criminal knowingly and willfully communicating, transmitting, furnishing or publishing classified information concerning: 1) the "nature, preparation, or use of any" code, cipher or cryptographic system "of the United States or any foreign government"; 2) the construction, use, maintenance or repair of any device used, or planned to be used for cryptographic intelligence purposes; 3) the communication intelligence activities of the United States or any foreign government; and, 4) information obtained by processes of communications intelligence from any foreign government, knowing the same to have been obtained by such processes.[372]

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370. Congress inadvertently enacted two provisions codified as 18 U.S.C. § 798.

371. Section 798 was enacted about four months prior to the enactment of 793(d) and (e) in the Internal Security Act of 1950. However, the bill was introduced, reported, and debated in the same period as 793(d) and (e) were making their way through the legislative process.

372. The full statute provides:

§ 798. Disclosure of Classified Information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

Although a few questions arise under this statute that has yet to receive judicial gloss, compared to sections 793 and 794 it is a model of precise draftsmanship.[373] First, the statute and its history make evident that violation occurs on knowing engagement in the proscribed conduct, without any additional requirement that the violator be animated by anti-American or pro-foreign motives. Second, the use of the term "publishes" makes clear that the prohibition is intended to bar public speech. Third, the inevitable vagueness in defining what cryptographic information is subject to restriction is substantially mitigated, although perhaps at the cost of overbreadth, by making classification an element of the offense.

One significant question left open under 798 is whether there is a defense of improper classification. Classified information is statutorily defined as that "which . . . is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." If "for reasons of national security" referred simply to the motive for classification, then no defense would be appropriate on the grounds that the discretion to classify was improperly exercised. The only effect of the phrase would be to make clear that information classified for reasons other than national security, and thus improperly classified under the Executive Orders authorizing the classification program, was not within the scope of 798. On the other hand, both the Senate and House Judiciary Committee Reports state: [t]he bill specifies that the classification must be *in fact* in the interests of national security."[374] This suggests that the appropriateness of the classification is a question of fact for the jury. Presumably, the courts would weigh heavily this indication of legislative intent, particularly since the result-

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

18 U.S.C. § 798 (1970).

373. There has been at least one prosecution which ended in a guilty plea. As is true with other espionage cases, covert transmission to an agent of a foreign government was involved. *See Hearings on Resolution to Establish Commission on Government Security* at 141 (1955).

374. S. REP. No. 111, 81st Cong., 1st Sess., at 3 (1949), H.R. REP. No. 1895, 81st Cong., 2d Sess., at 3 (1950) (emphasis added).

ing interpretation of 798 would accord with the position of 793 and 794 on this question.[375]

Whether, as a matter of sound policy, improper classification should be a defense is a difficult judgment to make. The principal argument against it is the familiar one, rejected in 793 and 794, that the Government may have to reveal too much in refuting the claim of improper classification.[376] It may be that cryptographic techniques would be rendered especially vulnerable if the Government was required to demonstrate why particular information must be classified. The countervailing consideration is, of course, the fact routinely accepted in all quarters that the Executive branch abuses the power of classification. To give the Executive unreviewable power to invoke a prohibition on the communications of everyone, even as to a relatively narrow category of information, seems to be of doubtful wisdom.

The conclusion that the legislative history would support a defense of improper classification is an important one in assessing the reasons why Congress, despite the 1917 Act, thought section 798 was necessary. Under the 1917 Act, the Government must prove defense-relatedness as an element of its case, and such a demonstration may itself significantly compromise Government secrecy. Prohibitions on disclosure of classified information as such, with no defense of improper classification, do not put the Government to this counterproductive burden of proof. Apparently, however, the committees did not intend to relieve the Government of this burden in prosecutions under section 798, and thus elimination of this problem for the Government under the 1917 Act cannot have been what moved Congress to adopt section 798. Instead, the passage of section 798 reflects other significant congressional assumptions about the limited scope of the Espionage Act of 1917. In addition, section 798 also evidences strong concern for freedom of the press at virtually the same time Congress was revising subsection 1(d) of the 1917 Act into the present subsections 793(d) and (e).

Information about cryptographic processes would clearly meet the test of "information relating to the national defense" within the meaning of the 1917 Act. Thus, the failure of the earlier Act to cover publication of code information must have been regarded as resulting from other limits in its scope. The legislative history of the cryptography provision strongly suggests that Congress and the Executive believed general publication of communications intelligence information would fail to meet the "intent or reason to believe that the information [communicated, obtained, copied, etc.] is to be used

375. *Compare* Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1962), refusing to hear a defense of improper classification under 50 U.S.C. § 783(b) which bars government employees from knowingly giving "information of a kind which shall have been classified by the President . . . as affecting the security of the United States" to agents of foreign governments or Communist party members or organizations.

376. *See* text accompanying note 124 *supra*.

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to the injury of the United States, or to the advantage of any foreign nation" required by the 1917 Act. Both committees noted that the Espionage Act of 1917 "protect[ed] this information, but only in a limited way."[377] They went on to state that under the Act "unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States."[378] The House Report concluded:

> The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting United States communication intelligence operations and all direct information about all United States codes and ciphers.[379]

The committees clearly assumed that cryptographic information was covered by 793 and that "revelation" of it was proscribed, if done with intent to injure the United States. Thus, the committees must have interpreted the 1917 Act's culpability standard as tantamount to a purpose requirement, since communication to the enemy is implicit in general publication, and therefore knowledge of injury to the United States can be assumed although the purpose of publication may be different.

The enactment of section 798 accordingly supports our understanding of the culpability standards of section 794 and subsections 793(a) and (b). Passage of a special statute to protect communications intelligence information from "knowing and willful publication" also reflects a reasonably narrow understanding of subsection 1(d) of the 1917 Act. The committees' understanding of section 1(d) is entirely speculative. About all that can be said is that the passage of 798 is consistent with a narrow reading of subsection 1(d), either as applicable only to current government employees,[380] or as embodying the restrictive Espionage Act culpability standard through the word "willfully," or as reaching communications but not publication, or because the "not entitled to receive it" phrase had never been implemented, leaving 1(d) without force. Thus, section 798 is consistent with our conclusion that Congress

377. H.R. REP. No. 1895, 81st Cong., 2d Sess., at 2 (1950); S. REP. No. 111, 81st Cong., 1st Sess., at 2 (1949).

378. *Id.*

379. H.R. REP. No. 1895, 81st Cong., 2d Sess., at 2 (1950).

380. Both Committees assumed that nothing in the Espionage Act of 1917 would prohibit *former* government employees from disclosing cryptographic information acquired during public service:

> As the matter now stands, prevention of the disclosure of information of our cryptographic systems, exclusive of State Department codes, and of communication intelligence activities rests solely on the discretion, loyalty, and good judgment of numerous individuals. During the recent war, there were many persons who acquired some information covered by this bill in the course of their duties. Most of these individuals are no longer connected with the services and are not now prohibited from making disclosures which can be most damaging to the security of the United States. They are subject to the temptations of personal gain and of publicity in making sensational disclosures of the personal information within the purview of this act.

H.R. REP. No. 1895 at 2; S. REP. No. 111 at 2.

did not understand subsection 1(d) to accomplish broad prohibitions on any and all communications of defense information to persons out of the line of Executive authority.

Section 798 is also an interesting example of Congress' approach to publication controls at the time of the revision of subsection 1(d). It represents a conscious narrowing by Congress of sweeping proposals to criminalize disclosure of defense information. What Congress refused to do in 798 is as important as what it did do. The Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor had urged Congress to prohibit revelation of any classified information;[381] however, the House Judiciary Committee rejected such an extensive prohibition on publication. Section 798, the committee said, "is an attempt to provide just such legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree."[382] Even with respect to the narrow category of cryptographic information, section 798 represents a conscious narrowing of suggested coverage. The initial proposal, according to the committee, would have penalized the "revelation or publication, not only of direct information about United States codes and ciphers themselves but of information transmitted in United States codes and ciphers."[383] Such a measure would have prohibited the publication of a great number of military and diplomatic dispatches sent by the Government to its overseas posts. The committee, however, reported out a bill that covered only information from foreign governments intercepted by cryptographic techniques. In the words of the Committee:

> Under the bill as now drafted there is no penalty for publishing the contents of United States Government communications (except, of course, those which reveal information in the categories directly protected by the bill itself). Even the texts of coded Government messages can be published without penalty as far as this bill is concerned, whether released for such publication by due authority of a Government department or passed out without authority or against orders by personnel of a department. In the latter case, of course, the Government personnel involved might be subject to punishment by administrative action but not, it is noted, under the provisions of this bill.[384]

381. The Report of the Joint Committee urged:
Based on the evidence in the Committee's record, the following recommendations are respectfully submitted: . . . That effective steps be taken to insure that statutory or other restrictions do not operate to the benefit of an enemy or other forces inimical to the Nation's security and to the handicap of our own intelligence agencies. With this in mind, the Congress should give serious study to, among other things, . . . to legislation designed to prevent unauthorized sketching, photographing, and mapping of military and naval reservations in peacetime; and to legislation fully protecting the security of classified matter.
REPORT OF THE JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, S. Doc. No. 244, 79th Cong., 2d Sess. 252-531 (1946).

382. H.R. REP. No. 1895, 81st Cong., 2d Sess., at 2 (1950).

383. *Id.* The proposals referred to were S. 805, 79th Cong.; S. 1019, 80th Cong.; S. 2680, 80th Cong.

384. *Id.*

With the bill limited to a narrow category of highly sensitive information, and with concern for public speech having been thus respected by the committee, it is no wonder that section 798 was supported by the American Society of Newspaper Editors.[385] The House passed the bill without debate,[386] and the Senate with virtually none.[387]

Is it likely that Congress could have contemporaneously evidenced such concern for the values of public debate in the context of communications intelligence information—surely among the most sensitive categories of defense information—and at the same time intended subsections 793(d) and (e) to accomplish sweeping controls on all communications of any information related to the national defense? It is possible, of course, that Congress was operating on entirely inconsistent premises in adopting section 798 and, four months later, subsections 793(d) and (e). We believe, however, that Congress' evident concern in narrowing section 798 supports the statements in the legislative history of subsections 793(d) and (e) that indicate sweeping controls on public speech about defense matters were not intended.

C. *The Photographic Statutes: 18 U.S.C. §§ 795, 797 and 50 U.S.C. App. § 781*

Section 797 of Title 18 expressly proscribes publication of a category of material whether or not undertaken with intent to injure the United States. Section 797's prohibition is derived from section 795 which prohibits the making of any "photograph, sketch, picture, drawing, map, or geographical representation" of "vital military installations or equipment," following their designation by the President "as requiring protection against the general dissemination of information relative thereto," unless the duplication is authorized by appropriate authority and submitted for censorship.[388] The offense is punishable by one year's imprisonment. Section 797 implements section 795

385. *See* remarks of Senator Hunt, 95 CONG. REC. 2774 (1949).

386. 96 CONG. REC. 6082 (1950).

387. The Senate debates on 798 add little. Senator Hunt explained the bill was proposed out of fear that persons no longer in the government might reveal communications intelligence information "for personal gain," and because "the present laws are not adequate in this particular respect." He emphasized that the bill "would not control in any way the free dissemination of information which might be transmitted in code or cipher." 95 CONG. REC. 2774-75 (1949).

388. 18 U.S.C. § 795 (1970). Section 795 provides:

> (a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.
>
> (b) Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.